



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 29, 1996

Ms. Jennifer D. Soldano
Associate General Counsel
Texas Department of Transportation
Dewitt C. Greer State Highway Bldg.
125 East 11th Street
Austin, Texas 78701-2483

OR96-1323

Dear Ms. Soldano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 100733.

The Texas Department of Transportation (the "department") received a request for certain information relating to the requestor's Request for Appeal Hearing. You state that most of the information requested will be provided to the requestor but assert that certain documents are excepted from required public disclosure pursuant to sections 552.101, 552.102, and 552.103 of the Government Code.

We note, initially, that the requestor, a department employee, appears to have seen or created some or all of the documents at issue. A release of records to this individual in her work capacity is not a public release under the Open Records Act. Attorney General Opinions JM-119 (1983) (Open Records Act cannot control right of access of member of governmental body to information held by that governmental body, when information requested in official capacity), JM-1235 (1990) (information may be transferred from one individual to another within a governmental body without losing confidential status); (Open Records Decision No. 468 (1987) at 3 (employee of agency whose job requires or permits certain access to records has not been granted access to those records as member of public). Nevertheless, we address the exceptions you raise under the assumption that the department considers this request for information to be a request for release of information to the public.

You assert that six documents relating to a complaint against the department filed with the Texas Commission on Human Rights may be withheld in their entirety under section 552.103. When asserting section 552.103(a), a governmental body must establish

that the requested information relates to pending or reasonably anticipated litigation.¹ Thus, under section 552.103(a) a governmental body's burden is two-pronged. The governmental body must establish that (1) litigation is either pending or reasonably anticipated and that (2) the requested information relates to that litigation. *See Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. You have provided this office with a copy of the complaint. This office has previously held that litigation is reasonably anticipated when a potential opposing party has filed a complaint with the Equal Employment Opportunity Commission. *See* Open Records Decision No. 336 (1982). Having examined these documents, we conclude that they are related to the reasonably anticipated litigation and, therefore, may be withheld in their entirety under section 552.103.²

You also assert that numerous documents or portions of these documents are excepted under sections 552.101 or 552.102 of the Government Code. Section 552.101 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision and incorporates the doctrine of common-law privacy. For information to be protected from public disclosure under the common-law right of privacy, the information must meet the criteria set out in *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. You also raise section 552.102, which protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The protection of section 552.102 is the same as that of the common-law right to privacy

¹Section 552.103(a) excepts from required public disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

²In reaching this conclusion, however, we assume that the opposing party to the litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, e.g., through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). If the opposing parties in the anticipated litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

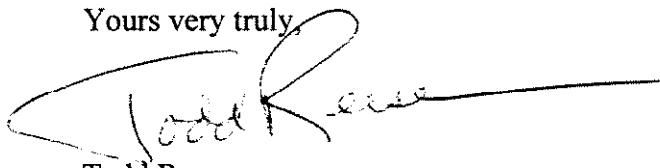
under section 552.101. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Consequently, we will consider these two exceptions together.

You have provided this office with numerous documents, portions of which regard federal tax information, optional insurance coverage, and other financial information. Financial information concerning an individual may be protected by a common-law right of privacy. See Open Records Decision Nos. 545 (1990), 523 (1989). Each of the documents or portions of documents you seek to withhold relate to personal investment decisions, personal financial information, and personal decisions relating to optional insurance coverage of an employee which this office has previously held is excepted under a common-law right to privacy. See Open Records Decision Nos. 600 (1992), 545 (1990). Therefore, each of these documents or portions of documents must be withheld under section 552.101 of the Government Code in conjunction with the common-law right to privacy. You also seek to withhold the "detailed medical information" contained on an employee's Evidence of Insurability Form. We agree that this information may also be withheld under section 552.101 of the Government Code in conjunction with the common-law right to privacy. You have also submitted an employee's W-4 form which is confidential under federal law and, therefore, also must be withheld. 26 U.S.C. § 6103; see also Open Records Decision No. 600 (1992) at 8-9.

Finally, you have submitted a Back to Work Letter signed by a physician which is confidential under section 5.08(b) of the Medical Practice Act ("MPA"), article 4495b, V.T.C.S. Section 5.08(b) provides that "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician" are confidential. Access to medical records is governed by the MPA rather than by chapter 552 of the Government Code. Open Records Decision No. 565 (1990) (release of medical records). When access to records is governed by provisions outside of chapter 552 of the Government Code, exceptions under chapter 552 are not applicable to the release of the records. Open Records Decision No. 598 (1991) at 1. You may release the records created or maintained by a physician only as provided under the MPA.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Todd Reese", with a long horizontal flourish extending to the right.

Todd Reese
Assistant Attorney General
Open Records Division

RTR/rho

Ref.: ID# 100733

Enclosures: Submitted documents